

Before the
COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DISTRIBUTION OF CABLE ROYALTY
FUNDS**

**CONSOLIDATED PROCEEDING
NO. 14-CRB-0010-CD
(2010–13)**

**PUBLIC TELEVISION CLAIMANTS' RESPONSE TO THE OTHER PARTIES'
BRIEFS ADDRESSING THE EVIDENTIARY ADJUSTMENT**

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I. Introduction

There are three types of purportedly global evidentiary studies before the Judges: the econometric regression analyses of Drs. Crawford and Israel, the attitudinal surveys of Messrs. Trautman and Horowitz, and the viewing study of Dr. Gray (collectively, the “2010–2013 Methodologies”). No party argues that any of these 2010–2013 Methodologies differentiates between the Basic, 3.75%, and Syndex Funds in purporting to generate shares of relative marketplace value. Instead, three parties (PS, SDC, and JSC) now argue that one or more of these 2010–2013 Methodologies were intended to measure each party’s share of only the Basic Fund, rather than measuring *all* of the programming to be compensated from the *Combined* Royalty Funds, and thus there is no need for an Evidentiary Adjustment to convert shares of total royalties to shares of the Basic Fund. This argument is unsupported by the record, precedent, or basic logic and should be rejected by the Judges.

In addressing this issue in their briefs, the parties agree on several points:

- All six parties acknowledge that prior arbiters have applied the Evidentiary Adjustment to Public Television’s estimated share under the Bortz survey methodology.¹
- All six parties agree that at least part of the Evidentiary Adjustment—the proportional increase in five of the parties’ shares to account for Public Television’s non-participation in the 3.75% Fund—should be applied regardless of which 2010–2013 Methodology is chosen (though CCG agrees with Public Television that such an adjustment must be accompanied by a proportional

¹ See JSC Brief at 2, 5-6, 8; CTV Brief at 1, 3-5; CCG Brief at 2-3, 6; SDC Brief at 1-2, 5; PS Brief at 2, 6.

increase to Public Television's share of the Basic Fund).²

- All parties except PS agree that the Judges should again apply the Evidentiary Adjustment to all three funds in at least some circumstances. Specifically, CCG acknowledges that the Evidentiary Adjustment must be applied to all 2010–2013 Methodologies that assess *all* programming and thus yield proposed shares of the Combined Royalty Funds; and JSC, CTV, and SDC concede that the Evidentiary Adjustment must be applied at least to the Bortz survey.³
- No party disputes that the record supplies both a method and data that can be used to calculate the Evidentiary Adjustment.⁴

CCG, in particular, confirms that the Evidentiary Adjustment is supported by both precedent and the record in this proceeding. CCG states that “[i]f the Judges base PTV’s award on a methodology that calculates shares of the total royalty pool, then the[] Basic Fund percentages [in Ms. Martin’s testimony] provide record evidence that can be used to calculate the increase in PTV’s share of the Basic Fund to compensate for its inability to be awarded funds directly from the 3.75 Fee Fund.”⁵ In a similar vein, CTV observes that the principle behind the Evidentiary Adjustment is rooted in precedent: “In sum, making [the Evidentiary] Adjustment is warranted if the Judges follow their own precedent in *Distribution of the 2004 and 2005 Cable*

² See JSC Brief at 1; JSC PCL at ¶ 31; CTV Brief at 11; CCG Brief at 6; SDC Brief at 5; PS Brief at 3, 7.

³ See JSC Brief at 2, 6, 8; CTV Brief at 1, 4 (citing proposed finding stating that Evidentiary Adjustment called for where methodology’s “results show the percentage value of all royalties”); CCG Brief at 6; SDC Brief at 1, 5, 7, 9-10.

⁴ See, e.g., CTV Brief at 1, 6-11; PTV Brief at 17; CCG Brief at 4-6. Ms. McLaughlin’s Appendix 2 allows the Judges to carry out these calculations automatically by inserting appropriate numbers from the record. See McLaughlin Affidavit at 7, Appx. 2.

⁵ CCG Brief at 6.

Royalty Funds, 75 Fed. Reg. 57063 (Sept. 17, 2010).”⁶

PS misleadingly suggests that Public Television is proposing the Evidentiary Adjustment as a means to “compensate[] PTV for [3.75%] royalties to which it is not entitled.”⁷ Nothing could be further from the truth. Public Television makes no claim to a share of the 3.75% or Syndex Funds.⁸ Instead, the purpose of the Evidentiary Adjustment is merely to match the evidence reflected in the 2010–2013 Methodologies with actual share allocations. If the Judges failed to apply the Evidentiary Adjustment to a 2010–2013 Methodology’s measurement based on *all* of the programming of the Combined Royalty Funds, the result would be that Public Television would receive an allocation from the Basic Fund *less* than the value estimated for Public Television, while all other claimants would receive allocations from the Basic and 3.75% Funds that together total *more* than the value estimated for those parties.

Contrary to the arguments of PS, SDC, and JSC, both precedent and the record in this proceeding support the application of the Evidentiary Adjustment to the 2010–2013 Methodologies. Although the Evidentiary Adjustment would not apply to *all* conceivable methodologies or in *all* circumstances, it must be applied where, as here, the evidence in the record demonstrates that the relevant methodologies are based on the Combined Royalty Funds—in other words, where the methodologies in evidence reflect the relative marketplace value of *all* compensable programming, regardless of the royalty rate that applies to such programming. Certain parties’ last-minute, post-hearing objections to the Evidentiary Adjustment are unfounded, untimely, and waived.

⁶ CTV Brief at 1.

⁷ PS Brief at 2.

⁸ *See* PTV Brief at 5.

II. The Evidentiary Adjustment Is Required Where a Methodology Yields Proposed Shares That Reflect All Programming.

Contrary to JSC and PS's suggestion, Public Television does not contend that the Evidentiary Adjustment should apply "automatically."⁹ Rather, the Evidentiary Adjustment is necessary where a proposed methodology measures overall relative marketplace value with respect to *all* programming, regardless of whether the statutory rate paid for such programming was the Basic, 3.75%, or Syndex Rate. To the extent that some signals that are eligible for the 3.75% Rate may have greater relative marketplace value than signals that are not so eligible, that difference is already accounted for in any methodology that estimates the relative marketplace value of *all* of the programming.

A. The Evidentiary Adjustment Translates Shares of the Combined Royalty Funds into Shares of Particular Funds.

The purpose of the Evidentiary Adjustment is not to automatically or indiscriminately award Public Television a share of funds to which they are not entitled.¹⁰ Its purpose is to account for evidence that does not properly address the parties' differential eligibility to participate in the Basic, 3.75%, and Syndex Funds. When presenting evidentiary studies, the parties are able to address this eligibility issue in two ways: (1) up front, by addressing the different funds separately in the methodology¹¹; or (2) after the fact, by converting overall share estimates into equivalent allocations of the appropriate funds.¹² Where a methodology depends

⁹ JSC Brief at 1, 7; *see* PS Brief at 6-7.

¹⁰ *See* JSC Brief at 1-3, 7; CTV Brief at 2 (noting that PTV may not receive 3.75% royalties); PS Brief at 1-2, 4, 6-7.

¹¹ *See, e.g., 1989 Cable Royalty Distribution Proceeding, Docket No. CRT. 91-2-89 CD*, 57 Fed. Reg. 15266, 15299 (April 27, 1992) (*1989 Determination*) (relying on viewing study with separable measurements of the Basic and 3.75% Funds).

¹² *See, e.g., Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005*, 75 Fed. Reg. 57063 (September 17, 2010) (*2004-05 Determination*); *Report of the*

on the latter approach—*i.e.*, it measures shares of the Combined Royalty Funds—the Evidentiary Adjustment must be applied to ensure that all parties receive share allocations equal in size (in terms of dollars) to their shares as measured directly by the methodology.¹³

Carrying out this adjustment does not award Public Television any portion of the 3.75% Fund, but instead adjusts Public Television's share of the Basic Fund upward only insofar as it correspondingly adjusts the other parties' shares of the 3.75% Fund upward.¹⁴ Ms. McLaughlin's simplified example is illustrative.¹⁵ There, a hypothetical methodology has determined that the two participating parties' works each have a relative market value of 50% of the Combined Royalty Funds, but the first party is entitled to recover only from the Basic Fund while the second party is entitled to recover from both the Basic and 3.75% Funds.¹⁶ The Basic Fund contains \$75 and the 3.75% Fund contains \$25.¹⁷

Copyright Arbitration Royalty Panel to the Librarian of Congress, Docket No. 2001-8 CARP CD 98-99 (October 21, 2003) (1998-99 Determination)

¹³ See Ex. 3012 at 24-25 (McLaughlin & Blackburn).

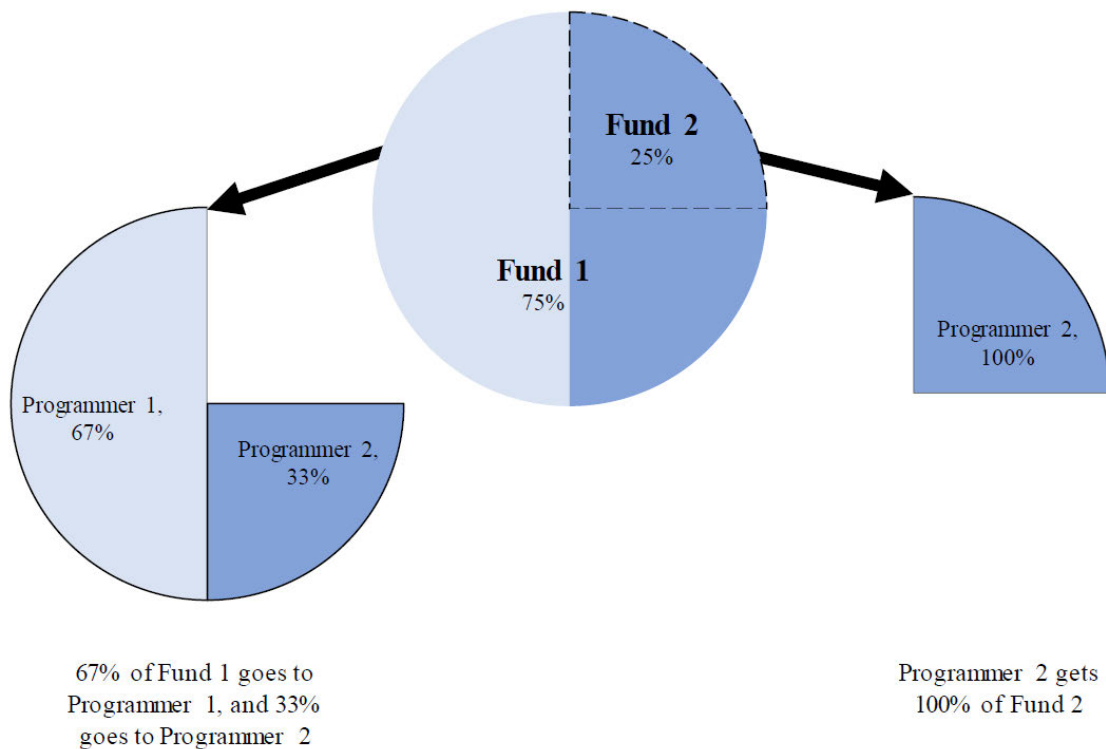
¹⁴ See McLaughlin Affidavit at 1, 5-6.

¹⁵ See *id.* at 5-6.

¹⁶ *Id.*

¹⁷ *Id.*

Figure 1: Example of Appropriate Adjustment¹⁸



Applying the Evidentiary Adjustment results in allocations of \$50 to the first party and \$50 to the second party—exactly in line with the estimated shares based on the Combined Royalty Funds.¹⁹ On the other hand, ignoring the Evidentiary Adjustment with respect to the larger fund while simply awarding the entirety of the smaller fund to the only eligible party for that fund would result in allocations of \$37.50 to the first party and \$62.50 to the second party—*neither* of which match the overall value estimated for each party based on the Combined Royalty Funds.²⁰ And failing to apply any adjustments at all (awarding 50% of the larger fund to each party, and only 50% of the smaller fund to the eligible second party) would result in an

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 5-6.

²⁰ *Id.* at 6.

allocation of \$37.50 to the first party, an allocation of \$50 to the second party, and an unallocated sum of \$12.50—a clearly unacceptable result.²¹

B. Precedent Supports the Application of the Evidentiary Adjustment to Shares That Reflect All Programming.

As the Judges’ prior decisions have recognized, the Evidentiary Adjustment does not apply indiscriminately to *all* potential methodologies,²² nor automatically to a party’s overall allocation share.²³ Prior decisions have held that the Evidentiary Adjustment is required where the Judges use as a baseline for determining shares a methodology that measures overall relative marketplace value of *all* programming, regardless of whether the royalties paid for such programming were at the Basic, 3.75%, or Syndex Rates.²⁴ The application of the Evidentiary Adjustment therefore depends on the particular methodology used to allocate shares, as well as other relevant evidence in the record.²⁵

²¹ *See id.* at 5-6.

²² The other parties appear to agree with Public Television on this point. *Compare* PTV Brief at 12 *with* JSC Brief at 1-2, 7-8, 8 n.5 (arguing that the Evidentiary Adjustment would not apply, for example, where a methodology produces tailored results for the Basic and 3.75% Funds); CCG Brief at 6 (“If the Judges base PTV’s award on a methodology that calculates shares of the *total* royalty pool, then these Basic Fund percentages provide record evidence that can be used to calculate the increase in PTV’s share of the Basic Fund to compensate for its inability to be awarded funds directly from the 3.75 Fee Fund.”) (emphasis added); SDC Brief at 9 (acknowledging that studies can be designed to yield separate measurements for the Basic, 3.75%, and Syndex Funds); *see also* PS Brief at 6-7 (suggesting erroneously that PTV claims an adjustment regardless of methodology).

²³ *See* JSC Brief at 1-2, 7.

²⁴ *See* 1998-99 *Determination* at 26 n. 10 (applies to Bortz survey methodology, whose respondents allocated overall budgets); 2004-05 *Determination*, 75 Fed. Reg. at 57070 *incorporating Proposed Findings of Fact and Conclusions of Law of the Settling Parties*, Docket No. 2007-3 CRB CD 2004-2005 at PFF at ¶ 317 (March 24, 2010) (“Both the unadjusted and augmented Bortz survey results show the percentage value of all royalties – Basic, 3.75 and Syndex – paid by the surveyed cable systems that the respondents assign to each programming type.”).

²⁵ *See id.*; *accord* JSC Brief at 1-2, 7.

This focus on the evidence in the record is clear from the 1998-99 and 2004-05 Determinations, which both applied the Evidentiary Adjustment to a methodology used to set baseline allocation shares before relying on other evidence in the record to further modify those shares. In the 1998-99 proceeding, the Panel determined that the Bortz survey would serve as the basis for allocating most of the royalty funds at issue,²⁶ but because of uncorrected flaws in that methodology, the Panel concluded that for Public Television's share, the Bortz survey would serve only as a floor.²⁷ This floor, the Panel explained, included an approximately 9% increase from Public Television's raw Bortz survey allocation "to account for PTV's non-participation in the 3.75% or Syndex Funds" and the Bortz survey's implicit decision not to distinguish value based on the Basic, 3.75%, and Syndex Funds.²⁸ Building on this floor,²⁹ the Panel then considered Public Television's evidence of changed circumstances and other evidence before concluding that they would further increase Public Television's share.³⁰

Similarly, in the 2004-05 proceeding, the Judges determined that the Bortz survey—as modified by the Evidentiary Adjustment—would serve as a "starting point" for setting allocations before applying further adjustments to account for other record evidence.³¹ Such

²⁶ See *1998-99 Determination* at 31. The exceptions were SDC's share, which was set by settlement agreement, and CCG's share, which was set by a fee generation methodology. See *id.* at 26 n.10.

²⁷ See *id.* at 25-26, 31.

²⁸ See *id.* at 26, 26 n.10; 69.

²⁹ As other parties have described, the Panel ultimately relied on several factors to set Public Television's allocation share, see CTV Brief at 3; SDC Brief at 4; PS Brief at 6-7, but there is no question that the Panel applied the Evidentiary Adjustment to craft a baseline for that allocation, see *1998-99 Determination* at 69 n.41 (reiterating that "the proper PTV award could not be lower than 3.2%") affirmed by *Distribution of the 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8-CARP CD 98-99, 69 Fed. Reg. 3606 (January 26, 2004) (*1998-99 Librarian Order*).

³⁰ See *id.* at 69.

³¹ See *2004-05 Determination*, 75 Fed. Reg. at 57070.

further adjustments included, for example, an upward adjustment to Public Television's allocation to account for biases against Public Television in the Bortz survey and a downward adjustment to SDC's allocation based on the results of the Waldfogel regression.³²

Although all parties acknowledge that the 1998-99 and 2004-05 Determinations endorsed the Evidentiary Adjustment, certain parties seek to escape those holdings by arguing that they applied only to the Bortz survey.³³ That argument ignores the reasoning underlying those decisions. In particular, the 1998-99 Panel observed that the Evidentiary Adjustment does not apply automatically to any given methodology or to final, multi-factor share allocations, but instead makes sense when applied to particular methodologies, like the Bortz survey, that measure overall value without addressing the parties' eligibility to participate in the different funds.³⁴ The Panel applied the Evidentiary Adjustment to the Bortz survey results before further adjusting the allocation shares based on other evidence in the record.³⁵ Although the Panel in a footnote declined to adopt Dr. Rosston's application of the Evidentiary Adjustment to his own regression methodology, the Panel confirmed that it had limited its use of Dr. Rosston's regression to the corroboration of the Bortz survey results.³⁶ The Panel therefore had no need to apply the Evidentiary Adjustment to Dr. Rosston's regression or to evaluate its application to

³² *See id.*

³³ *See, e.g.,* JSC Brief at 7-8; PS Brief at 2, 5-6.

³⁴ *See 1998-99 Determination* at 26 n.10.

³⁵ *See id.* at 25-26, 53-69. Ultimately, these further adjustments led the Panel to the same final allocation for Public Television as in 1990-92; however, the Evidentiary Adjustment was undoubtedly a component of the Panel's analysis. Had the Bortz survey estimated Public Television's share at a higher level than Public Television's 1990-92 allocation, for example, Public Television's award would have necessarily increased. *See id.* at 69 n.41 ("PTV award could not be lower than [the Bortz floor]").

³⁶ *See id.* at 48 n.21, 50.

regression-based methodologies generally. Indeed, in the next proceeding to consider the issue, the 2004-05 Judges agreed with the Settling Parties that the Evidentiary Adjustment extends to methodologies whose allocation shares “show the percentage value of all royalties – Basic, 3.75 and Syndex.”³⁷

Accordingly, the Judges should apply the Evidentiary Adjustment where, as here, the record demonstrates that the relevant methodologies measure relative marketplace value with respect to all programming, regardless of the rate paid for such programming. While this holds true for each 2010-2013 Methodology, Public Television specifically urges the Judges to apply the Evidentiary Adjustment to Dr. Crawford’s initial analysis, given its robustness and the various flaws of the other approaches highlighted in Public Television’s Proposed Findings of Fact and Conclusions of Law.

III. Contrary to the Post-Hearing Positions Now Taken by Other Parties, the Record Confirms that the Evidentiary Adjustment Applies to Each of the 2010–2013 Methodologies.

The record before the Judges confirms that the Judges should adhere to precedent by applying the Evidentiary Adjustment in this proceeding.³⁸ Contrary to the vague, unsupported, and last-minute assertions of other parties,³⁹ record evidence supports the application of the Evidentiary Adjustment to each of the 2010–2013 Methodologies.

³⁷ See *2004-05 Determination*, 75 Fed. Reg. at 57070 incorporating *Proposed Findings of Fact and Conclusions of Law of the Settling Parties*, Docket No. 2007-3 CRB CD 2004-2005 at at PFF at ¶ 317 (March 24, 2010).

³⁸ See *1998-99 Determination* at 14; *1998-99 Librarian Order*, 69 Fed. Reg. at 3614; *Nat’l Ass’n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 932 (D.C. Cir. 1985).

³⁹ See, e.g., PS Brief at 2, 7-8 (all 2010–2013 Methodologies); JSC Brief at 2, 7-8 (all 2010–2013 Methodologies other than Bortz survey); SDC Brief at 7-10 (same).

A. The Evidentiary Adjustment Applies to the Regression Analyses.

In her written direct testimony, Ms. McLaughlin specifically asserted that the Evidentiary Adjustment must be applied to the Crawford and Israel regression analyses because those methodologies determine overall shares of the Combined Royalty Funds.⁴⁰ Ms. McLaughlin reiterated the point in her oral testimony.⁴¹ At no point did any party introduce contrary evidence into the record or otherwise question the validity of Ms. McLaughlin's proposed adjustment.⁴²

Even when given the opportunity to clarify the now-closed record, no party identified any record evidence that would contradict Ms. McLaughlin's expert testimony. This includes the proponents of the Crawford and Israel regression analyses—JSC and CTV—who declined to address Ms. McLaughlin's testimony in support of the Evidentiary Adjustment, or to submit a clarifying affidavit from Drs. Crawford or Israel.⁴³ PS similarly declined to address Ms. McLaughlin's testimony, instead limiting its factual argument to addressing PS's own studies.⁴⁴

Only SDC attempted to identify record evidence to support its argument that the Evidentiary Adjustment would not apply to the Crawford and Israel regression analyses. Specifically, SDC argued that the Evidentiary Adjustment should not apply to these regressions because they each include a dummy variable for systems paying for one or more signals at the 3.75% Rate.⁴⁵ SDC's argument misapprehends the nature of dummy control variables. The

⁴⁰ Ex. 3012 at 24-25 (McLaughlin & Blackburn).

⁴¹ Tr. at 2477:2-2478:4 (McLaughlin).

⁴² See PTV Brief at 7-9.

⁴³ JSC Brief at 7-8; see CTV Brief at 1, 6-7.

⁴⁴ PS Brief at 7-8.

⁴⁵ See SDC Brief at 8-9 (pointing to discussions of dummy variables and controls).

3.75% dummy variables indicate that, *on average*, systems that carry one or more 3.75% signals pay more total royalties than other systems, and simply control for that difference *averaged* across all systems and subscriber groups.⁴⁶ The regressions continue to use the actual 3.75% royalties paid by each individual system or subscriber group, and continue to use the signals that generate those 3.75% royalties, when calculating the relative market value of the programming on all of the signals. Neither Dr. Crawford nor Dr. Israel attempted to calculate the individual parties' regression coefficients separately with respect to signals that generate 3.75% royalties, or separately with respect to signals that do not generate 3.75% royalties. Indeed, the fact that the Crawford and Israel regressions employed a 3.75% dummy variable—while still including all of the 3.75% signals and the royalties paid on those signals as sources of variation for the regressions—underscores that the Evidentiary Adjustment is warranted.⁴⁷ Neither Dr. Crawford nor Dr. Israel has submitted any affidavit to the contrary.

Beyond this conceptual error, SDC's argument is further contradicted by the actual evidence in the record addressing the applicability of the Evidentiary Adjustment: the record testimony of Drs. Rosston and Waldfoegel. As Dr. Waldfoegel explained, by including a 3.75% dummy variable “the minutes coefficients are effectively determined by the variation within the ‘no-3.75%’ group and within the ‘3.75%-inclusive’ group. The minutes coefficients are therefore not determined by the difference between royalty payments in the 3.75% and no-3.75% groups.”⁴⁸

⁴⁶ See Ex. 2004 at A-2 (Crawford); Ex. 1003 at 16 (Israel).

⁴⁷ Cf. 1998-99 *Determination* at 26 n.10.

⁴⁸ Ex. 1051 at Appx. 3 at 3 (Waldfoegel).

Relatedly, both Drs. Rosston and Waldfogel confirmed that the Evidentiary Adjustment would apply to their methodologically similar regression analyses. Dr. Rosston explained:

Q. Now, given that Public Television only draws from the Basic Fund and that your estimates relate to the entire royalty pool, would you agree that Public Television's 7.54 percent share of the total royalty pool would need to be mathematically converted upward to arrive at Public Television's share of the Basic Fund only?

A. Yes. This would be much easier for the Panel to do and the splitting into years, because, for example, if each fund were worth \$50 million and Public Television's share is 7.54 percent in my estimate of the \$100 million, it would be 15 percent of the -- I forget what you called it -- the basic pool?

Q. The Basic Fund is what Public Television participates in.

A. . . . The Basic Fund. So it's just -- you can easily do this conversion based on what size the different pools are.

....

A. . . . But you also want to make sure that this leads to -- it makes a lot of sense that you would do this math and increase the share of Public Television in this Fund and decrease the shares of everybody else in this Fund, but then my numbers would be -- have to be increased for the remaining people in the 3.74 and SYNDEX Fund. The shares would go up because you wouldn't have the Public Television share in that other Fund, right?

Q. That's right.⁴⁹

Similarly, Dr. Waldfogel confirmed that his regression, too, resulted in shares of the Combined Royalty Funds, requiring application of the Evidentiary Adjustment:

Q. Okay. And it also does not model for the different types of funds? For example, you don't -- your regression doesn't say coverage as the basic fund or the 3.75 funds. This is just one collective analysis for all of the funds, right?

A. The dependent variable is the total payment into all the funds. The 3.75 variable does make some account for the situations in which the 3.75 fund is -- is relevant; but -- but the dependent variable, you are right, is the total payment into all the funds.⁵⁰

⁴⁹ Ex. 1046 at 71, 73 (2860:17-2861:13, 2866:11-20) (Rosston).

⁵⁰ Ex. 1052 at 55-56 (823:12-824:7) (Waldfogel); *see also* 04-05 *Determination*, 75 Fed. Reg. at 57070 *incorporating Proposed Findings of Fact and Conclusions of Law of the Settling Parties*,

Although this approach ultimately necessitates the Evidentiary Adjustment, Dr. Waldfoegel further explained that the non-differentiation between Basic and 3.75 signals was also a feature, not a bug, of his regression methodology because “[o]ne wants to use as much data as possible to identify coefficients.”⁵¹ Dr. Crawford’s comprehensive dataset of CSOs’ revealed preferences used that same type of variation within the data, in addition to numerous other features and innovations, to measure relative marketplace value of the Combined Royalty Funds.⁵²

B. The Evidentiary Adjustment Applies to the CSO Surveys.

Ms. McLaughlin also asserted directly in her written direct testimony that the Evidentiary Adjustment must be applied to the augmented Bortz and Horowitz survey methodologies because those methodologies determine overall shares of the Combined Royalty Funds.⁵³ Ms. McLaughlin reiterated the point in her oral testimony.⁵⁴ At no point did any party introduce contrary evidence into the record or otherwise question the validity of Ms. McLaughlin’s proposed adjustment.⁵⁵

Docket No. 2007-3 CRB CD 2004-2005 at PFF at ¶ 317 (March 24, 2010) (calling for Evidentiary Adjustment where “results show the percentage value of all royalties – Basic, 3.75 and Syndex – paid by the surveyed cable systems”).

⁵¹ Ex. 1052 at 69 (878:20-22) (Waldfoegel).

⁵² See Tr. 1386:19-1387:17 (Crawford); Tr. 2067:18-2068:24 (George); Tr. 2901:20-2903:7 (Israel).

⁵³ Ex. 3012 at 24-25 (McLaughlin & Blackburn).

⁵⁴ Tr. at 2477:2-2478:4 (McLaughlin).

⁵⁵ See PTV Brief at 7-9.

Mr. Trautman himself confirmed that the Evidentiary Adjustment should be applied to the augmented Bortz survey,⁵⁶ and essentially all parties concede as much.⁵⁷ Only PS now argues that the Evidentiary Adjustment should not be applied to the augmented Bortz survey.⁵⁸ PS's argument is that (1) prior determinations have purportedly limited the application of the Evidentiary Adjustment to apparently hypothetical circumstances in which Public Television's award is based *solely* on the Bortz survey and (2) by advocating for an allocation based on methodologies other than the Bortz survey, Public Television has somehow rejected the application of the Evidentiary Adjustment to the augmented Bortz survey.⁵⁹

PS is mistaken on both of its premises. First, as described in greater detail above, prior determinations have applied the Evidentiary Adjustment to augmented Bortz surveys before adjusting the resulting baseline shares upwards to account for other record evidence.⁶⁰ Should the Judges choose to base Public Television's allocation on the augmented Bortz survey, there is no reason why they should not once again apply the Evidentiary Adjustment to establish baseline shares before further modifying Public Television's allocation based on other evidence. Second, there is no reason why Public Television's advocacy for the Crawford regression would have somehow invalidated Public Television's separate arguments as to the proper application of other methodologies—Public Television specifically argued that the Evidentiary Adjustment should

⁵⁶ Ex. 1002 at 38-39, Tbl. 10, Appx. A at A-2 (Trautman).

⁵⁷ See JSC Brief at 2, 6, 8; CTV Brief at 1; CCG Brief at 6; SDC Brief at 1, 5, 7, 9-10.

⁵⁸ PS Brief at 2.

⁵⁹ See PS Brief at 2,7 (“Because . . . PTV has conceded that [] an award [based on the Bortz Survey] would be inappropriate, PTV's proposed Basic Fund adjustment . . . should not be adopted by the Judges in this proceeding.”).

⁶⁰ See Section II.B., *supra*.

apply to *all* of the proposed 2010-2013 Methodologies (including the augmented Bortz survey) and included that argument in its Proposed Findings of Fact and Conclusions of Law.⁶¹

PS also now argues that the Evidentiary Adjustment should not be applied to the Horowitz survey because its proposed shares were intended to be applied to the Basic Fund.⁶² Mr. Horowitz's professed intent, disclosed for the first time in his July 13, 2018 affidavit, is contradicted by the now-closed record in this proceeding. Most importantly, Mr. Horowitz does not even contest that his study measures overall relative marketplace value, nor that the survey's respondents allocated a fixed budget without differentiating between the Basic, 3.75%, and Syndex Funds.⁶³ To the contrary, his testimony in the record confirms these points.⁶⁴ In fact, at no point in the proceeding did Mr. Horowitz—or PS, for that matter—offer any testimony to controvert Ms. McLaughlin's specific assertion that the Evidentiary Adjustment should apply to the Horowitz survey because it, like the Bortz survey, proposes shares of the Combined Royalty Funds.⁶⁵ Notwithstanding Mr. Horowitz's tardy, conclusory claim about an “appropriate” application of his study,⁶⁶ there is no legal or factual basis in the record to distinguish the Horowitz survey from the Bortz survey, both of which require the application of the Evidentiary Adjustment.⁶⁷

⁶¹ See PTV PFF at ¶¶ 43-45, 198; PTV PCL at ¶¶ 30-32; *see also* 37 C.F.R. § 351.14(b).

⁶² See PS Brief at 7-8; *see also* JSC Brief at 7-8 (arguing, without citation, that no record evidence supports application of the Evidentiary Adjustment to non-Bortz methodologies).

⁶³ See Horowitz Affidavit at 1-3.

⁶⁴ See Ex. 6012 at 5-7, 12, 16, Appx. A at 36 (Horowitz).

⁶⁵ See Ex. 3012 at 24; *see also* McLaughlin Affidavit at 3.

⁶⁶ See Horowitz Affidavit at 2-3.

⁶⁷ See 98-99 *Determination* at 26 n.10.

On a separate but related note, although SDC concedes that the Horowitz survey, like the Bortz survey, is premised on respondents allocating a fixed budget, SDC suggests that the Evidentiary Adjustment should not apply to the Horowitz survey because it proposes a higher share for Public Television than does the Bortz survey.⁶⁸ This argument makes no sense. As SDC acknowledges elsewhere in its brief, two of the major methodological flaws with the 04-05 Bortz survey were that: (1) it improperly excluded PTV-only systems from its methodology and (2) it failed to account for Public Television's non-participation in the 3.75% Fund.⁶⁹ SDC also acknowledges that the purpose of the Evidentiary Adjustment has been to account for the latter methodological flaw, Public Television's non-participation in the 3.75% Fund, and not simply to award Public Television a higher share than some other methodology.⁷⁰ It does not follow that, because the Horowitz survey may have remedied the former methodological flaw, it also somehow remedied the latter methodological flaw—the failure to account for Public Television's non-participation in the 3.75% Fund—simply by virtue of a higher result for Public Television's share.⁷¹

C. The Evidentiary Adjustment Applies to Dr. Gray's Viewing Study.

If Dr. Gray's viewing study is used as a measure of relative marketplace value to allocate shares, then the record makes clear that the Evidentiary Adjustment must be applied to those shares because his methodology determines overall shares with respect to all programming,

⁶⁸ See SDC Brief at 7.

⁶⁹ See *id.* at 5.

⁷⁰ See *id.*; see also Section II.A., *supra*.

⁷¹ Compare SDC Brief at 5 (2004-05 McLaughlin adjustments accounted for (1) the Bortz survey's exclusion of PTV-only and Canadian-only systems and (2) Public Television's non-participation in the 3.75% Fund) with SDC Brief at 7 (Horowitz survey remedied issue of exclusion of PTV-only and Canadian-only systems).

regardless of whether the statutory rate paid for such programming was the Basic, 3.75%, or Syndex Rate.

Dr. Gray testified that “*total* program volume represents rational CSOs’ choices and provides a measure of the relative economic value of the programming to the CSOs.”⁷² He therefore measured “each claimant category’s share of *total* distant viewing as the sum of estimated household viewing of that category’s programs divided by the sum of the estimated distant household viewing of all categories.”⁷³ Dr. Gray’s study did not take into account differences in viewing based on whether a signal was paid for at the Basic, 3.75%, or Syndex Rates.⁷⁴ Given the study’s focus on *total* viewing numbers, Dr. Gray proposed allocation shares for each party equal to “its share of the *total* 2010-2013 Cable Royalties.”⁷⁵

Dr. Gray does not dispute these aspects of his study in his affidavit submitted with PS’s brief.⁷⁶ Instead, Dr. Gray now suggests, for the first time, that his study’s measure of overall relative marketplace value “applies to the Basic Fund, as it is the only fund in which all claimant groups participate.”⁷⁷ Yet Dr. Gray offers no rationale for why a methodology based on 100% of programming minutes should be applied to only 86.2%⁷⁸ of the Combined Royalty Funds. Had Dr. Gray in fact intended his viewing study to calculate relative marketplace value based on the Basic Fund alone, he would have attempted to exclude viewing volume for stations paid for at

⁷² Ex. 6036 at 9 (Gray) (emphasis added).

⁷³ *Id.* at 18 (emphasis added).

⁷⁴ *See id.* at 8-11, 15-20, Tbls. 1-2.

⁷⁵ *Id.* at 20 (emphasis added); *accord* PS PFF ¶ 355 (requesting a “total royalty allocation”).

⁷⁶ *See* Gray Affidavit at 1, 7.

⁷⁷ *Id.* at 2.

⁷⁸ *See* Ex. 4009 at 7, Tbls. 1a-1b (Martin) (Basic Fund).

the 3.75% and Syndex Rates, as was done in the 1989 proceeding.⁷⁹ In any event, even if this were Dr. Gray's original intent, there is no record basis to distinguish the viewing study's measurement of overall relative marketplace value from prior applications of the Evidentiary Adjustment to methodologies yielding overall proposed shares with respect to all programming, regardless of the statutory rate paid for such programming.

IV. Other Parties' Objections to the Application of the Evidentiary Adjustment Are Untimely and Waived.

Other parties waived their objections to the Evidentiary Adjustment by failing to present timely evidence or argument. They had ample opportunity to address the Evidentiary Adjustment over the course of these proceedings and instead chose not to raise the issue.

A. The Other Parties Knew of Both the Precedents and Public Television's Evidence Regarding the Evidentiary Adjustment, and Chose Not to Submit Any Evidence Disputing the Evidentiary Adjustment.

PS, SDC, and JSC waived their argument by knowingly and intentionally deciding not to submit evidence or advance arguments disputing the Evidentiary Adjustment.⁸⁰ The issue of whether the Evidentiary Adjustment should apply is neither novel nor unexpected. Indeed, both past precedent and Public Television's testimony in this proceeding specifically addressed the issue. Longstanding precedent holds that the Evidentiary Adjustment applies to methodologies that estimate parties' shares based on an analysis of all funds (*i.e.*, all programming) combined,⁸¹ but PS, SDC, and JSC decided not to submit written direct testimony disputing its application. Nor did they submit written rebuttal testimony addressing the issue after Public Television

⁷⁹ See *1989 Determination*, 57 Fed. Reg. at 15299 (viewing data distinguished between Basic and 3.75% signals).

⁸⁰ See, *e.g.*, PS Brief at 2, 7-8; SDC Brief at 7-9; JSC Brief at 2, 7-8.

⁸¹ See, *e.g.*, *1998-99 Determination* at 26 n.10.

submitted written direct testimony on March 9, 2017, that specifically stated that each of the 2010–2013 Methodologies “determine shares of the Combined Royalty Funds” and that “in order for PTV to receive the share of total value to CSOs estimated by the other experts, it must receive a larger share of the Basic Fund, since it will receive no share from the other funds.”⁸² During the hearing, PS, SDC, and JSC did not present live testimony or cross-examine any witnesses on the point, even after Ms. McLaughlin again testified that the Evidentiary Adjustment is necessary for “all of these studies.”⁸³ And PS, SDC, and JSC chose not to raise the point during closing arguments, when Public Television reiterated the need for the Evidentiary Adjustment.⁸⁴ Accordingly, PS, SDC, and JSC waived their arguments against the Evidentiary Adjustment by intentionally deciding not to present testimony or argument on this issue.⁸⁵

B. By Rule, the Other Parties’ Failure to Propose Findings and Conclusions Objecting to the Evidentiary Adjustment Constitutes a Waiver.

PS, SDC, and JSC also waived their belated arguments under the Judges’ own regulations, because they did not propose any such findings or cite to any supporting evidence in

⁸² See Testimony of Linda McLaughlin and David Blackburn (March 9, 2017), at 24, *in* Amended Written Direct Statement of Public Television (March 9, 2017); *see also* Ex. 3012 at 24-25 (McLaughlin & Blackburn) (corrected version to reflect corrections in other experts’ testimony, dated April 17, 2017).

⁸³ Tr. 2476:21-2478:4 (McLaughlin).

⁸⁴ Tr. 4469 (Dove).

⁸⁵ *See, e.g., United States v. Laslie*, 716 F.3d 612, 614 (D.C. Cir. 2013) (holding that a party waived an objection where “his decision not to challenge the [issue] was deliberate” because “[h]is focus [on persuading the court] was elsewhere”). Cursory or belated arguments are generally insufficient to preserve an argument. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) (collecting cases); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (reviewing courts should not consider arguments made to an agency unless made “at the time appropriate under its practice”); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (declining to decide an untimely argument, even after ordering supplemental briefing).

their proposed findings of fact.⁸⁶ The Judges’ regulations provide that a party “waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party.”⁸⁷ In addition, proposed findings of fact must “include all basic evidentiary facts developed on the record used to support conclusions, and shall contain appropriate citations to the record for each evidentiary fact.”⁸⁸ The Judges further emphasized in their March 19, 2018 Order Regarding Post-Hearing Submissions and Appearance that “[e]ach participant shall propose Findings of Fact with direct reference *and citation* to the record in this proceeding,” and that “[p]articipants shall support each proposed conclusion of law with one or more *citations* to relevant authority or authorities.”⁸⁹

PS did not propose any finding or conclusion that conflicts with the Evidentiary Adjustment in its Proposed Findings of Fact and Conclusions of Law.⁹⁰ Accordingly, by rule, PS waived its argument.⁹¹ Indeed, PS proposed three findings that *supported* the application of the Evidentiary Adjustment. First, PS acknowledged in its proposed findings that Dr. Gray’s viewing study and Mr. Horowitz’s survey measured shares with respect to *all* programming (not

⁸⁶ By contrast, and as described by CCG, Public Television addressed, and provided support for, the Evidentiary Adjustment in both its Proposed Findings of Findings of Fact and Conclusions of Law and its response to other parties’ Proposed Findings of Fact and Conclusions of Law. *See* CCG Brief at 2-3; *see also* PTV PFF at ¶¶ 43-45, 198; PTV PCL at ¶¶ 30-32; PTV RPCL at ¶ 7.

⁸⁷ 37 C.F.R. § 351.14(b); *see also* Order Denying Motion for Rehearing at 3, *In re Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, Docket No. 2006-1 CRB DSTRA (January 8, 2008) (deeming claims that were not presented “either in the proceeding or in [the party’s] proposed findings of fact” to have been waived).

⁸⁸ 37 C.F.R. § 351.14(c).

⁸⁹ Order Regarding Post-Hearing Submissions and Appearance, Docket No. 14-CRB-0010-CD (2010-2013), at 1 (March 19, 2018) (emphases in original); *accord* 37 C.F.R. § 351.14(c).

⁹⁰ *See generally* PS PFFCL; *see also* PS PCL ¶ 2 (claiming 100% of the Syndex Fund, but drawing no distinction between the Basic and 3.75% Funds).

⁹¹ 37 C.F.R. § 351.14(b).

merely programming paid for at the Basic Rate) by requesting a “*total* royalty allocation” on the basis of their estimates.⁹² Second, PS proposed that it should receive 100% of the Syndex Fund, but drew no distinction between the Basic Fund and the 3.75% Fund.⁹³ Third, PS conceded that Dr. Gray’s viewing study may require “appropriate adjustments” before awarding shares to each claimant group, and did not dispute the Evidentiary Adjustment that Public Television specifically proposed in both its written and live testimony.⁹⁴ The Judges’ regulations provide that PS’s failure to propose any finding or conclusion that conflicts with the Evidentiary Adjustment “waive[d] any objection” it belatedly seeks to advance.⁹⁵

In PS’s subsequent response to Public Television’s proposed findings, PS elliptically hinted at the issue, but that response came too late.⁹⁶ PS’s response still did not propose any finding of fact opposing the Evidentiary Adjustment. And in its proposed conclusions of law, PS merely asserted (without any rationale or discussion of the relevant case law) that “it would not be appropriate” to “award additional compensation to PTV from the Basic Fund to address PTV’s non-participation in the 3.75% and Syndex Funds.”⁹⁷ Given that PS’s initial proposed findings stated that the Judges should calculate “*total* royalty allocation[s],”⁹⁸ this statement in PS’s response is reasonably understood to suggest that Public Television should not receive

⁹² PS PFF at ¶ 355 (emphasis added).

⁹³ PS PCL ¶ 2. PS’s total royalty allocation would have been unaffected by the Syndex Fund, which accounted for only 0.01 percent of the Combined Royalty Funds. *See* Ex. 4009 at 5 (Martin).

⁹⁴ PS PCL ¶ 36.

⁹⁵ 37 C.F.R. § 351.14(b).

⁹⁶ *See* 37 C.F.R. § 351.14(b)-(c); *Order Regarding Post-Hearing Submissions and Appearance*, Docket No. 14-CRB-0010-CD (2010-2013), at 1 (March 19, 2018).

⁹⁷ *See* PS RPCL at ¶ 12.

⁹⁸ PS PFF at ¶ 355 (emphasis added).

“additional compensation” *beyond the Evidentiary Adjustment* to address Public Television’s non-participation in the 3.75% Fund and Syndex Fund. Moreover, PS’s sole supporting citation was to the Judges’ 2000-03 Determination—which, because of settlement agreements, did not consider the application of the Evidentiary Adjustment at all.⁹⁹ PS made no reference to the 1998-99 and 2004-05 Determinations, which applied the Evidentiary Adjustment.¹⁰⁰ PS had already waived the issue by failing to raise it in PS’s Proposed Findings of Fact and Conclusions of Law,¹⁰¹ and PS’s cursory response to Public Television’s proposed findings on the issue underscores PS’s waiver.¹⁰²

SDC similarly waived its argument that there is no basis to apply the Evidentiary Adjustment to the 2010–2013 Methodologies.¹⁰³ SDC did not propose any finding of fact suggesting that the Evidentiary Adjustment should not apply. SDC’s only proposed conclusion of law that touched on this issue was its bald statement in a footnote that the Bortz and Horowitz survey results “can be used for the allocation of the Basic Fund. The 3.75 Fund should be prorated to remove PTV.”¹⁰⁴ Despite ample opportunity to submit testimony on the issue, SDC did not cite any authority or provide any explanation. SDC’s failure to cite *anything* in

⁹⁹ See PS RPCL at ¶ 12.

¹⁰⁰ See PS RPCL at ¶ 12; compare *Distribution of the 2000-2003 Cable Royalty Funds*, Docket No. 2008-2 CRB CD 2000-2003, 75 Fed. Reg. 26798, 26803 (May 12, 2010) with *1998-99 Determination and 2004-05 Determination*, 75 Fed. Reg. at 57063.

¹⁰¹ See 37 C.F.R. § 351.14(b)-(c).

¹⁰² See *Intercollegiate Broad. Sys.*, 574 F.3d at 756; *Am. Wildlands*, 530 F.3d at 1001.

¹⁰³ See PS Brief at 2, 7-8. Notably, however, SDC concedes that the Evidentiary Adjustment should at least apply to the Bortz survey. SDC Brief at 1-2, 5, 7, 9.

¹⁰⁴ SDC PFF at ¶ 164 n.9.

connection with that statement violated the rules and the Judges' Order.¹⁰⁵ And in its response to Public Television's proposed findings, SDC did not make any statements regarding adjustment of the Basic Fund.

JSC likewise waived its argument that there is no basis to apply the Evidentiary Adjustment to the 2010–2013 Methodologies.¹⁰⁶ Nothing in JSC's Proposed Findings of Fact or Conclusions of Law conflicts with application of the Evidentiary Adjustment. As with SDC, JSC at no point in the proceeding—not even in response to Public Television's Proposed Findings of Fact—raised this argument or presented any supporting evidence.¹⁰⁷ Accordingly, JSC's arguments are waived.¹⁰⁸ Even now, JSC's brief identifies no legal or factual support that contradicts the application of the Evidentiary Adjustment to the 2010–2013 Methodologies.¹⁰⁹

¹⁰⁵ See 37 C.F.R. § 351.14(c); *Order Regarding Post-Hearing Submissions and Appearance*, Docket No. 14-CRB-0010-CD (2010-2013), at 1 (March 19, 2018); see also *Intercollegiate Broad. Sys.*, 574 F.3d at 756; *Am. Wildlands*, 530 F.3d at 1001.

¹⁰⁶ See JSC Brief at 7-8. Notably, however, JSC concedes that the Evidentiary Adjustment should at least apply to the Bortz survey. JSC Brief at 2, 6.7-8.

¹⁰⁷ See JSC PCL at ¶¶ 17, 29-31 (confirming Evidentiary Adjustment applies to Bortz survey, but not addressing other methodologies).

¹⁰⁸ See 37 C.F.R. § 351.14(b); accord 37 C.F.R. § 351.14(c); *Order Regarding Post-Hearing Submissions and Appearance*, Docket No. 14-CRB-0010-CD (2010-2013), at 1 (March 19, 2018).

¹⁰⁹ See JSC Brief at 7-8 (discussing only fee-generation and distant-subscriber-instances methodologies, neither of which was ultimately proposed by any of the parties as a methodology for determining shares). Notably, no expert in this proceeding testified in support of a fee-generation methodology. See PTV RPF at ¶¶ 52-53; accord SDC Brief at 5 n.2. JSC has also expounded on the flaws of fee-generation methodologies in the past, including in Appendix A to its Brief. See *Proposed Findings of Fact and Conclusions of Law of the Settling Parties*, Docket No. 2007-3 CRB CD 2004-2005 at PFF at ¶¶ 593-649, PCL at ¶¶ 25-32 (March 24, 2010). In that proceeding, Public Television received an award significantly greater than its fee-generation share. Compare *2004-05 Determination*, 75 Fed. Reg. at 57071 with Ex. 4012 at Ex. CDN-1-N at 1-2 (De Freitas).

V. Conclusion

For the foregoing reasons, the Judges should heed the uncontroverted evidence in the record and apply the Evidentiary Adjustment to allocation shares based on the 2010–2013 Methodologies.

July 30, 2018

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Monday, July 30, 2018 I provided a true and correct copy of the Public Television's Response to Briefs Addressing Evidentiary Adjustment to the following:

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